by criminal process, or was himself aware that the complaint did not warrant such process. (*d*)

In 1842 the observations of the judge on the trial of the indictment, tending to cast censure on the mode in which the prosecution had been conducted, were admitted by Littledale, J., in favour of the plaintiff. (*e*) This ruling was followed six years afterwards, as regards the observations of the magistrate in dismissing the charge. (*f*) But in 1841, it was declared that the observations of the judge on the former trial are not admissible against the defendant in the action for malicious prosecution, (*g*) and a similar view was enunciated on the most recent English case in which, so far as we have ascertained, the point has arisen, Mellor, J., being of opinion that the remarks made by the magistrate on the plaintiff's discharge are not competent evidence in the plaintiff's behalf, since, if they are unfavorable to him he has no means of replying to them. (*h*)

The conflict of opinion thus disclosed is embarrassing, but the doctrine which declares such evidence to be admissible is, it is submitted, the correct one. The essential question in actions of this kind is assumed in all the decisions to be this: What inferences would a man of ordinary intelligence have drawn as to the plaintiff's guilt from the information which he had, or ought to have had, in his possession when he instituted the proceedings, and it seems to be inconsistent with principle to exclude entirely evidence going to shew the judgment formed by one who has such exceptional opportunities for arriving at a just conclusion as a trial judge or a magistrate. The rights of the parties in the second action would, we think, be quite sufficiently safeguarded if the jury were expressly cautioned against ascribing undue weight to such evidence. In Canada the drift of judicial opinion seems to be decidedly in the direction of sustaining its admissibility. (*i*)

(*d*) *McNellis* v. *Gartshore* (1853) 2 U.C.C.P. 464.

(*e*) *Warne* v. *Terry* (1836), cited in Roscoe Nisi Pr. Ev. p. 886.

(*f*) *Edden* v. *Thorniloe* (1842) 6 Jur. 264.

(*g*) *Barker* v. *Augeil* (1841) 2 Moo. & Rob. 371, per Lord Denman.

(*h*) *Welslar* v. *Zachariah* (1867) 16 L.T.N.S. 432, per Mellor, J.

(*i*) Thus it has been held that a statement of the justice who issued the warrant that the defendant told him all the circumstances, and appeared to be acting in good faith, is evidence going more to rebut malice than to establish the existence of probable cause, but that it is not to be overlooked when the only fact to show the want of probable cause was that the charge was, upon investigation, dismissed by the magistrates: *Barbour* v. *Gettings* (1867) 26 U.C. Q.B. 544. In *Rice* v. *Saunders* (1876) 27 U.C.C.P. 27 also, the court were to some extent influenced by the fact that after the acquittal of the plaintiff, the trial judge had recorded upon the indictment his opinion that there was probable cause for the prosecution.